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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1761

RUBEL L. PHILLIPS, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CITATIONS

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Rubel L. Phillips petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 571 F.2d 708, where it is styled *United States of America* v. *David Stirling, Jr., William G. Stirling, Harold M. Yanowitch, Edwin J. Schultz and Rubel L. Phillips,* No. 77-1140. There is no district court opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1978. A petition for rehearing was de-

nied without opinion on April 13, 1978 (App. C). On May 3, 1978, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including June 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

There are three basic and related questions:

1. Whether the failure to grant petitioner a severance under Rule 14 of the Federal Rules of Criminal Procedure caused him to be deprived of Fifth and Sixth Amendment rights; namely, the right to due process of law and the right to a meaningful trial by an impartial jury in the state and district where the crime was committed;

2. Whether the time has not come when this Court should exercise its supervisory power over the trial of multi-count, multi-defendant and multi-state conspiracy indictments; and

3. Whether the Supreme Court should consider anew the issue of "reviewability" of trial court denials of motions to sever under Rule 14.

STATUTORY AND OTHER PROVISIONS INVOLVED

Rule 14 of the Federal Rules of Criminal Procedure provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

STATEMENT

Petitioner Rubel L. Phillips was indicted and tried jointly with David Stirling, William G. Stirling, Harold M. Yanowitch and Edwin J. Schultz, on a nine-count indictment alleging violations of the securities laws in two counts,[1] mail fraud in eight counts,[2] and one count of conspiracy[3] (App. B). After a five-week trial and jury verdict, Rubel Phillips was adjudged guilty on all counts of the indictment and sentenced to 10-month concurrent terms of imprisonment and a fine of $5,000.00 on each of the first 8 counts of the indictment, with imposition of sentence suspended as to Count 9. After a motion for stay was denied by the circuit court and by a Justice of this Court, petitioner began serving his sentence in May of 1978.

I. The Indictment

All counts of the indictment incorporate and are based on paragraphs 10 through 16 of Count 1 (App. B., pp. 3b-6b). These seven paragraphs are entitled "The Means By Which The Fraud Scheme Was Carried Out." Paragraphs 10, 11, 12, 13 and 16 charge all defendants expect petitioner Phillips with illegal conduct. Paragraphs 14 and 15 charge all defendants, including the petitioner, with illegal conduct. The conspiracy count purports to allege a single conspiracy, but in fact relates to at least six schemes. The discussion below, of the proof produced at trial, shows that the government's evidence connects petitioner to only one of the alleged schemes.

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[1] 15 U.S.C. 77q(a), 77x.

[2] 18 U.S.C. 1341.

[3] 18 U.S.C. 371, 1001, and 1341 and 15 U.S.C. 77q(a), 77x, and 78ff.

II. Representations of the Prosecutor

At a pretrial conference on November 8, 1976, petitioner Phillips' trial counsel stated that he intended to move for a severance. The prosecutor then represented to the court that the evidence would show either explicitly or by inference that Phillips had knowledge of the acts charged in pararaphs 10-16 of Count 1 of the indictment, not just those acts charged in paragraphs 14 and 15. Based on those representations, petitioner's trial counsel advised the court that he would refrain from making a pretrial severance motion. However, with the court's permission, he reserved the right to make such a motion later if the government's proof was not as represented (Nov. 8, 1976, Tr. 18-22; see also *United States* v. *Stirling*, 571 F.2d 708 (C.A. 2) at 732, fn. 20; App. A, p. 46a).

After the government rested its case, petitioner's counsel moved for a severance on the ground, among other things, that the government had not lived up to its pretrial representations with respect to connecting petitioner Phillips with the illegal conduct outlined in paragraphs 10, 11, 12, 13 and 16. That motion was summarily denied. After the verdict was returned, petitioner's counsel moved for a new trial on the ground that severance should have been granted. This motion was also denied.

III. Proof at Trial

The evidence introduced against Mr. Phillips at trial related to the Greater Gulf Coast Housing Development Corporation and an exchange of letters in connection with that Mississippi corporation and a Farmers Home Administration commitment letter which was alleged to have been forged in connection with that

same corporation (paragraph 14 of Count 1 and paragraph 2 of Count 9). The testimony of an immunized witness, who was an admitted perjurer, was used to connect petitioner Phillips with the forged letter, which testimony was bootstrapped by evidence of a prior consistent statement made by the immunized witness. The government also contended that some evidence amounted to false statements made to the government.[4]

With respect to other matters alleged in the indictment there are at least five other separate schemes involving the sale of separate plots of land and the issuance of reports and registration statements concerning these sales (paragraphs 10, 11 and 12 of Count 1); the manner of accounting for sales (paragraph 12 of Count 1); the manner of accounting for matters not involved in the Mississippi transaction (paragraph 15 of Count 1); and the relations between the Stirling Homex Corporation and its unions and issuance of registration statements involving these relations (paragraph 15 of Count 1). In petitioner's view, these matters—most of which predated any relationship he had with the other defendants—all constitute separate conspiracies (or at least separate schemes) as to which *no evidence* was introduced against him.

The egregious prejudice to petitioner occasioned by the failure to sever him is perhaps best illustrated by the manner in which the court of appeals opinion analyzes the facts underlying what it terms a "multi-

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[4] Assuming *arguendo* that there was a "false statement", to some unnamed official, what has this to do with defrauding the investing public?

faceted plan" to defraud the investing public. *United States* v. *Stirling, supra* at 714-24.[5] The circuit court groups the facts under 16 "facets", each with a separate title. Petitioner Phillips is linked with only one of these 16, that involving the Greater Gulf Coast Housing Development Corporation in Mississippi. Ten of the "facets" had been consummated prior to the time Phillips arrived upon the scene, and the petitioner was not mentioned by the court in its description of the remaining five, with respect to which the evidence refutes petitioner's involvement.[6]

There is no evidence which tends to show that petitioner Phillips had anything to do with the preparation or content of the registration statements, annual and quarterly reports and bizarre accounting practices which form the legal foundation of the government's case.[7] There is evidence which shows that petitioner was "fired" in March, 1972, as counsel for Stirling Homex because he refused to write an optimistic letter concerning the possibility of financing for the Greater Gulf project.

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[5] App. A, pp. 7a-29a.

[6] The indictment alleged that petitioner became associated with the other defendants "in or about 1971." The proof at trial showed that petitioner first met the other defendants on December 10, 1970, and was retained by Stirling Homex Corporation (the company controlled by the other defendants below) in January of 1971 in Jackson, Mississippi, where he maintained his law practice. Petitioner's work for Stirling Homex was limited to Mississippi and had nothing to do with SEC matters.

[7] There was evidence given by petitioner that he, on a visit to New York, was asked to and did read a page and a half of a prospectus referring to Greater Gulf which was innocuous.

REASONS FOR GRANTING THE PETITION

This case should be of significance and concern to the Court. This is not just a case of abuse of discretion or of alleged prosecutorial misrepresentations. Rather, the failure of the court to sever petitioner Phillips deprived the petitioner of basic constitutional rights and furthered a growing tendency to refuse relief from grossly prejudicial joinder.[8] The failure to sever has deprived petitioner Phillips of his Fifth Amendment protection—he has been deprived of his liberty without due process of law.

The nature of the indictment and the proof at trial also severely prejudiced petitioner's Sixth Amendment right to a meaningful trial by an impartial jury.

Had petitioner been severed at a time when it was clear that the government's proof as to him constituted alleged criminal conduct of a Mississippi citizen in Mississippi, the proof of which involved documents located in Mississippi and witnesses (including all but one of the defense and character witnesses) from Mississippi, venue would have been in Mississippi. Thus, petitioner was also deprived of his Sixth Amendment right to a trial by jury of the state and district where the crime was alleged to have been committed.

These issues clearly transcend the particular facts of this case. Conspiracy indictments and prejudicial joinder have become, unfortunately, relatively common in our criminal justice system, with the voice of

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[8] Reversal of convictions because of a denial of severance are so rare that one writer has said the title of Rule 14 should be "No Relief from Prejudicial Joinder". Walsh, Fair Trials and the Federal Rules of Criminal Procedure, 1963, 49 A.B.A.J. 853.

conscience being stilled by the proposition that jury instructions are a curative. In a case of prejudicial joinder and a refusal to sever, jury instructions cannot be the solvent to dissolve that which the tainted paintbrush of conspiracy has applied.

This case supplies a vehicle by which the Supreme Court may consider what has become the "unreviewability" of trial court denials of motions to sever under Rule 14.

1. In its opinion the circuit court clearly enunciated the prevailing judicial philosophy with respect to severance and to Rule 14 of the Federal Rules of Criminal Procedure, and posed this issue as:

> . . . whether the refusal of the district court to sever Phillips from the main trial was so unfairly prejudicial under Rule 14 as to constitute an abuse of discretion. This is a difficult burden for Phillips to meet. 'The determination of the elusive criterion of prejudice rests in judicial discretion at the trial level, and is virtually unreviewable.' 8 Moore's Federal Practice ¶ 14.02[1], at 14-3 (2d ed. 1977) (footnote omitted). While we do not shirk our responsibility of review, we are reluctant to overturn a conviction for denial of a motion for severance unless there is a showing of substantial prejudice. *United States* v. *Stirling, supra* at 733 (App. A, p. 48a).[9]

The usual reason given for this abdication of appellate responsibility is "[t]he public interest in avoiding unnecessary multiplicious litigation . . ." *United States* v. *Stirling, supra* at 733. We submit that the public in-

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[9] It is interesting to note that Moore's treatise, from which the quote was taken, severely criticizes the "unreviewability" of denials of severance.

terest is ill served by giving trial courts *carte blanche* to refuse to sever a "peripheral" defendant from those who are at the hub of a complex criminal conspiracy. The Court should reexamine this public interest rationale. Slight changes in prosecutive policy and the exercise of prosecutorial discretion (e.g., Dyer Act or narcotic possession cases) could have a far greater impact on the federal case load than severing out defendants, such as the petitioner, in very complex conspiracy cases.

2. The handmaiden of the public interest rationale involves the efficient utilization of judges, prosecutors and defense counsel. No one likes to think about the repetition of a 5-week trial. However, in many cases this proposition rests on a false assumption—that it will take as long to try a severed individual as it would to try all of the conspirators. Such need not have been the case with petitioner and, indeed, it should not be true in any case where a defendant can be charged with substantive violations and was involved only in one facet of a "multifaceted" conspiracy. The record in this case demonstrates that the severance of petitioner prior to the trial of this case would have saved many days in the trial of the remaining defendants. Indeed, as a theoretical matter, it would have been possible to shape a prosecution of petitioner and a separate prosecution of the other defendants which would have served justice and saved judicial time.

3. An amalgam of Fifth and Sixth Amendment rights, the right to due process and the right to a fair trial, should, in the best of all worlds, give a person the right to be judged on his individual guilt or innocence, a right to confront the evidence against him free from the inevitable odor of massive incriminatory evidence introduced against others. Two assumptions seem to

underly judicial attitudes with respect to denial of severance motions: first, the public interest in avoiding multiple litigation, discussed in 1 and 2 above; and, second, the "mass trial or no trial at all" theory which was articulated in *United States* v. *Cohen,* 145 F.2d 82, 95 (C.A. 2), where Judge Learned Hand said that "the chance that a joint trial will not as to them be a fair trial, has to be balanced against the fact that it is a joint trial or none." This was certainly not true in petitioner's case and, in any event, "considering the importance of the premise, it is remarkable how little it is articulated and how meager is its factual support." 8 Moore's Federal Practice ¶ 14.04[1].

4. It must be remembered that conspiracy prosecutions offer many advantages to the prosecution. Unfortunately, these *very* advantages—rulings on admissibility, exceptions to the hearsay rule, etc.—give rise to *per se* prejudice to peripheral defendants. In these situations, one would think "the court would be especially alert to the possibilities of prejudice to defendants, and especially ready to grant a severance." [10] Justice Jackson, in a concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 445-446, in which Justices Frankfurter and Murphy joined, has commented:

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice. (footnote omitted).

The prejudice which may arise during a complex conspiracy trial to those defendants whose alleged

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[10] Wright, Federal Practice and Procedure, Sec. 226.

involvement was relatively nominal is self-evident. The question then arises as to whether juries can sort out the evidence as to such defendants in complex cases without being influenced by the obvious guilt of others with whom they have been joined. This case graphically illustrates that the answer is no. In other contexts this Court has held that jury instructions cannot cure a substantial risk that the jury will fail to compartmentalize that which it has heard at trial. This was true in *Bruton* v. *United States,* 391 U.S 123, with respect to testimony concerning a co-defendant's confession that inculpated Bruton; and it was true in *Jackson* v. *Denno,* 378 U.S. 368, with respect to a jury's inability to ignore a confession of guilt if it found that confession to be involuntary.[11] Similarly, we submit, this Court should consider whether jury instructions can effectively protect the right to a fair trial of one we have termed a peripheral defendant in a "multi-faceted" conspiracy case. As Mr. Justice Jackson said in his concurring opinion in *Krulewitch* v. *United States, supra* at 453, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing attorneys know to be unmitigated fiction."

5. Had petitioner's motion to sever been granted, it would have been possible to vindicate another of petitioner's constitutional rights, the right to be tried in his own vicinage which is afforded both by Section

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[11] Jury instructions were not mentioned in *Douglas* v. *Alabama,* 380 U.S. 415, but it was assumed that nothing except cross-examination could cure the prosecutor's reading of an inculpatory statement given by a hostile witness under the guise of refreshing his recollection.

2 of Article III and by the Sixth Amendment of the Constitution. Petitioner's conduct of which the government complains occurred in Mississippi. The documents introduced which were connected to petitioner originated in Mississippi. All of the government's witnesses but one and the principal witness (who was immunized from prosecution) against petitioner were from Mississippi. Petitioner was a man of good character—and this was known in Mississippi. Except for one expert, petitioner's witnesses were all from Mississippi. Had severance been granted and venue changed to Mississippi, petitioner would have been spared the ruinous expense of a 5-week trial in a state far from his home, but, more importantly, he would have received a fair trial—his due under the Constitution.

6. This Court in *Kotteakos* v. *United States,* 328 U.S. 750, 772-3, put it very well when it said:

> Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass

> trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

The increasing tendency to deny defendants ensnared in a multi-state, multifaceted conspiracy case the benefits and protection of the Fifth and Sixth Amendments should be halted. This case could be used for such a laudatory purpose.

7. Severance of this petitioner should have been granted pretrial; and, indeed, a motion for severance would have been made and might have been granted were it not for the representations of the prosecutor referred to on page 4 above. After it rested, the government had not lived up to those representations, but the judge had invested three weeks of his time in hearing the government's side of the case, and the motion for severance made at that time was denied in spite of the obligation placed on trial courts by *Shaeffer* v. *United States,* 362 U.S. 511, to grant a severance at any stage of a trial if prejudice to a particular defendant is manifest. In such cases a judge is most apt to be influenced by his personal investment of time and thoughts of efficient utilization of judicial manpower. However, and to the contrary, severance should always be afforded when a defendant has been held in a case by virtue of prosecutorial representations as to evidence which are not fulfilled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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